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Sent: Tuesday, April 28, 2015 6:18 PM
To:
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Subject: Budget Speaker Registration/Testimony
Attachments: 20150428181823_Bill 24 - Testimony of Slovin Ito final.pdf

~~Budget Speaker Registration~~/Testimony

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Name(*) Gary Slovin
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Meeting Date (*) 2015-04-29
Council/PH Committee (*) Budget
Agenda Item (*) Bill 24
Your position on the matter (*) Oppose
Representing (*) Organization
Organization Slovin & Ito LLP
Do you wish to speak at the hearing? (*) Yes

Written Testimony

Testimony Attachment 20150428181823_Bill 24 - Testimony of Slovin Ito final.pdf
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**Testimony of
Gary M. Slovin / Mihoko E. Ito**

DATE: April 28, 2015

TO: Councilmember Ann Kobayashi, Chair, Committee on Budget,
City and County Council of Honolulu

RE: **Bill 24, Proposed CD1 – Relating to Car Sharing**
Hearing Date: Wednesday, April 29, 2015 at 9 a.m.

Dear Chair Kobayashi and Members of the Committee on Budget:

We submit this testimony in **opposition** to Bill 24.

For the past several months, the City Council has been considering the establishment of a car sharing program using city parking spaces. Presently, the Council has before it Bill 24, which establishes various requirements and guidelines for the beginning of a car sharing program. It should be noted that our client, Enterprise Holdings, LLC, has already established a car sharing program without the benefit of city assistance by using its own resources and capital to obtain private parking spaces. Therefore, it is not clear that the City Council faces a compelling need to utilize taxpayer-funded facilities to establish a government car sharing program which, at present, seems primarily focused on enabling Car2Go, a private company and competitor of Enterprise, to establish its car sharing program. Car2Go has made it clear that, without being provided city spaces at a low rate, it cannot operate its business. Enterprise, on the other hand, has already established its program and will continue to operate whether the City Council establishes a program or not.

Based on certain municipal law principles, we believe that Enterprise has valid legal arguments that the City Council would be specifically enabling a private company a competitive advantage through the use of taxpayer property. However, to this point, Enterprise has been willing to support the program, so long as Car2Go is not given a competitive advantage over the Enterprise program. When the first bill on car sharing was introduced, the rates for all the parking spaces was the same. However, recent versions of the bill, including the one before Council at this time, have given a preferential rate to Car2Go.

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The Council rationale appears to be that the Car2Go and Enterprise models are so different that a different rate is justified. Further, the City has argued, apparently based on information provided by Car2Go, that the Car2Go vehicles will occupy the spaces they use for only a short period of time and, therefore, are entitled to a lower rate. We believe this argument is incorrect on two grounds.

First, while there are variations between the models, the two models are competing for the same customers. In both models it is possible for the customer to return the car rented to the same area it came from. In this business, price is the single most influential determinant of customer choice. This fact should not be surprising. Customers will use the company whose rates are lower. Because the rate assigned to Car2Go by Bill 24 is less than that accorded to Enterprise, Enterprise will undoubtedly lose customers to Car2Go. This discrimination is exacerbated by the fact that being able to use city spaces is a requirement for Car2Go to do business in the first place.

Second, taxpayer property is obviously intended for the use of taxpayers and for public purposes and not for the purpose of enabling private businesses to set up shop. While such a program may or may not be defensible, it is not appropriate for that property to be used in such a way as to give a competitive advantage to one company over another that is in the very same business. A private business can play that way. Government should not.

One of the key texts on municipal law is McQuillin on Municipal Corporations. Even a brief review of basic principles of municipal law indicates that Bill 24 is very likely to be illegal and possibly violative of antitrust laws. If so, Bill 24 could subject the City to treble damages and attorney's fees. This risk is being run for what appears primarily to be an effort to provide Car2Go an advantage over its competitor. While we recognize the foregoing is not the intent of the Council, we ask that the Council try viewing Bill 24 from the perspective of Enterprise.

McQuillin notes that "an ordinance must be general, uniform and impartial in its operation." Clearly bill 24 is, on its face, partial to one business over another. Further, it is noted that "An ordinance must be general in its character and operate equally on all persons within the municipality of the class to which it relates." Again, Bill 24 does not operate equally. With no rational basis, as indicated by information from the San Diego pilot study that has been provided to the members, the ordinance favors one competitor over another. The San Diego pilot project data indicates that the free floating permit based cars in its car sharing program occupy the public spaces for substantial periods of the day, and that Car2Go will utilize public spaces in the same way that Enterprise does. Bill 24 appears to assume that the Car2Go declarations about its expected use of public spaces will be correct. The bill does not provide any controls on

the self-reporting by Car2Go of its usage, and it is not reasonable to expect a business to describe such a situation in a manner that hurts its cause.

Again, quoting McQuillin, “ordinances that grant privileges must make them available to all persons on the same terms and conditions.” Bill 24, by its present terms, is, in essence, granting to Car2Go the use of public property to enable that company to operate its business. And it does it in a manner that does not treat its main competitor equally. On its face, this is unfair. We further believe such favoritism makes Bill 24 invalid and that passage in its present form would constitute a violation of antitrust laws by giving one competitor an advantage over another.

Finally, McQuillin notes that “an ordinance may not discriminate between persons engaged in the same trade or pursuit.” While the difference in rental rates is the clearest problem in Bill 24, there are other elements of the bill that provide marketing advantages to Car2Go over Enterprise. The bill, in a sense, assumes that it understands the rental car business to a greater extent than does Enterprise, a company which is very well established in Hawaii and nationally. We believe that if the City Council gives further consideration to the issues raised and particularly follows examples in other cities, such as Boston, Massachusetts, it will have to conclude that all competitors must be treated equally.

While Car2Go has never done business in Hawaii, Enterprise has been in business in the State for over 20 years employing over 1000 people. It has carried on that business by competing on an equal basis with the other Hawaii and national competitors. The discrimination we describe is underlined by the fact that Car2Go has stated that, without the structure of Bill 24, it cannot operate its business. We believe that, aside from the legal principles above, it is a matter of common sense that a business cannot compete with its competitor in the same business, when the other business is given preferential treatment by the government. A further irony is that Enterprise has contributed as a taxpayer to the property Car2Go would be permitted to use at a preferential rate. We feel this is illegal, but, more importantly, it is simply unfair.

For the above reasons, we would ask that Bill 24 either be amended to address these concerns or be held in Committee. Thank you for the opportunity to submit this testimony.